NG LEAN HUAT

v.

LIM JOO KHIM

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK BIN
HJ. ISHAK JC
[CIVIL APPEAL NO. 11-5-92(92)]
14 JULY 1993

FAMILY LAW: Maintenance for son in custody of wife - Quantum - Whether earning capacity of husband to be considered in assessment of maintenance - Section 3 Married Women and Children (Maintenance) Act, 1950 (Revised 1981) Act 263 - Appeal by husband against order of Magistrate's Court to pay RM600 per month for wife and son - Duty of husband to maintain wife and legitimate children - Section 5(2) of the said Act.

This was an appeal by the appellant/husband against the decision of the Magistrate's Court, Parit Buntar which ordered him to pay a sum of RM600 per month as from 14 April, 1992 for maintenance of the respondent/wife and their son.

Held:
The maintenance order of the trial Court was varied to RM500 per month for the maintenance of the appellant's wife and son.

Cases referred to:
Kok Heng Chow v. Lay Mee Yin [1948] MLJ 157 ***(refd)***
Chew Cheng Swee v. Chan Chye Neo [1932] MLJ 5 ***(refd)***
Stewart v. Stewart [1952] 18 MLJ 211 ***(refd)***
Raquiza v. Raquiza [1947] 13 MLJ 202 ***(refd)***
Chong Hooi v. Tee Ngi (f) [1958] 24 MLJ 83 ***(refd)***
O.D. v. O.D. [1976] Fam 83, 90 ***(refd)***
W v. W [1976] Fam 107, 112 ***(refd)***
Klucinski v. Klucinski [1953] 1 WLR 522 ***(refd)***
Griffiths v. Griffiths [1974] 1 WLR 1350 ***(refd)***
Ette v. Ette [1965] 1 WLR 1433 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 360
Married Women and Children (Maintenance) Act 1950, ss. 3(1) & 5(2)

For the appellant/defendant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent/appellant - J Jena; M/s. J Jena & Co.

JUDGMENT

Hj. Abdul Malik bin Hj. Ishak JC:
This is an appeal from the decision of the Magistrate, Magistrate's Court, Parit Buntar, Perak ("the trial Court"). The trial Court ordered the appellant/defendant ("the husband") to pay as from 14 April, 1992 RM600 per month for maintenance of the respondent/applicant ("the wife") and their son, who was at the material time, in the custody of the wife.

The parties were married according to the Chinese customary rites and they had four children, three girls and a boy. In 1984, when the wife was carrying the youngest child (the boy), it was alleged that the husband assaulted her when she enquired about the "other woman". In due course, the husband forcibly sent the wife to her mother's house. There were incessant quarrels between the parties in regard to the "other woman". The husband refused to allow the three girls to stay with the wife. Visitation rights to the three girls were also denied to the wife. Concerted attempts were made by the wife for her three daughters to stay with her, but it was simply hopeless. The wife denied that the husband had attempted to bring her back to the matrimonial home. The wife averred that the husband had failed to maintain her and their son since 1984.

It was in evidence before the trial Court, that the wife and her son were supported by both her elderly mother and brother. The elderly mother gave evidence and she stated that it needed RM400 per month to maintain her daughter and her grandson. The boy is currently in standard two and is 9 years of age. The wife agreed, if the "other woman" was not staying with her husband and her husband refrained from assaulting her, she would be willing to stay with him.

It was alleged that the husband runs a successful iron foundry business, owns a number of properties and lives with his mistress. In rebuttal, the husband denied ownership of the iron foundry business and tendered a business registration card showing that the iron foundry business under the business style of Hong Huat Foundry, was under the sole proprietorship of his brother, one Ng Leang Weng. The husband denied being a property owner and stated that he is currently staying in a house

belonging to his brother. In a show of arrogance, the husband went to the Parit Buntar Magistrate's Court in a Mercedes Benz belonging to his brother, on the day of the hearing.

The husband gave evidence before the trial Court and he stated that he was merely an employee of Hong Huat Foundry for the last 13 years. He is presently providing for his three daughters, who are all schooling, on his fixed salary of RM500 per month. He admitted that occasionally his brother and mother would assist him financially. He denied being married to the "other woman" in 1990 and alleged that he had made overtures to his wife to return to him but she simply refused. He stated that he had tried to woo his wife back via two representatives, but it was totally futile. He stated further that he was willing to accept his wife and son back.

The husband averred that he needed RM400 per month to maintain his three daughters; and that he further needed RM50 a month to maintain his only means of transportation, i.e. a motorcycle. He stated that he did not venture to look for other jobs, as there was an agreement between his family members, that as he grew older he would be paid a lump sum by the company. He reiterated that from time to time his brother would help him financially. He admitted, unashamedly, that he stayed with his wealthy mistress for the past one year and consequently agreed that he had committed adultery. He explained that he kept the rich mistress after his wife had left him and not before. He admitted visiting his wife when she gave birth to their son. He again, unashamedly admitted, that since 1984 he did not maintain his wife and his son.

The husband ventured to say that the quarrel in 1984 was due to his wife's neglect in taking care of the three daughters and not because he had an affair with the "other woman".

Mr. Karpal Singh, learned Counsel for the husband, contended with his usual persuasion that the trial Court had rightly ordered the husband to maintain his wife and his son but erred in regard to the quantum. He submitted that the earning capacity of the husband should be the guiding factor in assessing the quantum of maintenance and that the trial Court should not rely on fluid criteria. He submitted that the trial Court was unduly influenced by the borrowed Mercedes Benz which the husband brought to the Court house and the existence of the mistress. Finally, he urged me to rely solely on the concrete evidence as adduced before the trial Court and not to rely on conjectures and possibilities.

Mr. J. Jena, learned Counsel for the wife, urged me to take the whole evidence in perspective especially the admission of the husband that he kept a mistress and to balance it with his earning capacity.

At the outset, it is useful to note that a maintenance proceeding by a wife against her husband under s. 3 of the Married Women And Children (Maintenance) Act, 1950 (Revised 1981), Act 263 ("the Act") is civil in nature but its enforcement is entirely criminal in texture. In this context, reference may be made to the following authorities. In *Chew Cheng Swee v. Chan Chye Neo* [1932] MLJ 5, the members of the Appellate Court of the Straits Settlements held that an order in a maintenance proceeding for the payment of an allowance creates a civil debt. Again, in *Kok Heng Chow v. Lay Mee Yin* [1948] MLJ 157, Evans J. in adverting to s. 360 of the Criminal Procedure Code, in relation to an order for maintenance of a wife, held that it is a civil claim for money due from the husband by a person he is bound to support. Lastly, in *Stewart v. Stewart* [1952] 18 MLJ 211, Spenser Wilkinson J. after referring to the two cases cited above held that in an application by a wife for maintenance for herself and her children or an application by a husband to vary the amount ordered to be paid by way of maintenance is a civil matter.

The outright refusal by the husband to maintain his wife and his son since 1984 cannot be excused. It is the husband's duty under the Act to maintain his wife and his legitimate children and the onus is clearly upon him to show that for some good reason he is excused from the performance of that duty. Such a reason (clearly spelt out in section 5(2) of the Act) would be if he could show, firstly, that his wife is living in adultery, or, secondly, without any sufficient reason, she refuses to live with her husband. In the instant appeal, on the available evidence, there is nothing which excuses the husband from the performance of his duty. The wife, in the instant appeal, is not adulterous, but the husband is. She refuses to

live with her husband because he lives with the wealthy mistress and because he likes to assault her. She is willing to stay with her husband provided he severs his relationship with his mistress and refrains from assaulting her (see *Raquiza v. Raquiza* [1947] 13 MLJ 202).

Section 3(1) of the Act provides, *inter alia*, that if a person neglects to maintain his wife or child, the Court **may** order such person to make a monthly allowance for the maintenance of his wife or child, in proportion to the means of such person, as the Court sees reasonable. The permissiveness of the word "**may**", though negatively phrased, is coupled with a duty, vested unto the Court, to enforce the legal right of a wife who has proved her case. The question to ask is this: Has the wife succeeded in proving her case within the ambit of s. 3(1) of the Act? The answer is certainly in the affirmative. The husband in his testimony admitted failing to maintain his wife and his son since 1984.

The trial Court took the correct stand, in the context of s. 5 of the Act, when it considered the grounds of refusal as advanced by the wife in the light of the husband's offer to take both her and her son back (see *Chong Hooi v. Tee Ngi* (f) [1958] 24 MLJ 83). It seems to me that the husband wants to take advantage of both worlds. He wants his wife and his son's back **and** at the same time he wants to keep his wealthy mistress. A wife would not be prepared to put up with this kind of arrangement. She would certainly resent being treated in this manner.

Now, in regard to the quantum of maintenance.

The earning capacity of the husband, as reflected in the evidence, would be the fixed salary of RM500; the funds available to him through his mother and brother; the lump sum amount which he was promised, as he grew older, from the iron foundry business; and last, but by no means least, the family's wealth. It must also be borne in mind that the husband's life style, for example his preference to drive his brother's Mercedes Benz to the Parit Buntar Magistrate's Court and his penchant for a wealthy mistress must be taken into consideration in deciding the quantum of maintenance.

In assessing the husband's ability to pay, the Courts have, time and again, looked at the realities of the parties' financial position. The Courts are concerned not only with what a man is shown to have "but also what would reasonably be made available to him if he wished" (see *O.D v. O.D* [1976] Fam. 83, 90, per Omrod L.J). To quote examples, in *Ette v. Ette* [1965] 1 WLR 1433 where the husband was provided with free board and lodging by his mistress; in *W. v. W* [1976] Fam 107, 112 where there was a financial provision in the form of a lump sum and lastly, in *Klucinski v. Klucinski* [1953] 1 WLR 522 where tips and regular overtime pay - were all taken into account in deciding the quantum for maintenance.

On the other end of the scale, the wife aged 33, has got a potential earning capacity and she could obtain work in the near future. Currently she is unemployed, but in the near future as her son grows to be independent, she might be gainfully employed. She was cross-examined but she denied being employed in Kuala Lumpur. If the potential of a husband to obtain gainful employment can be construed in *Griffiths v. Griffiths* [1974] 1 WLR 1350, the same principle should apply to the wife in the instant appeal.

However, the fact that the wife and her son were maintained by her own family, would not *per se*, affect her chances of winning the maintenance suit against her husband. In short, a husband is not relieved from his duty to maintain his wife and his son by the fact that she has money of her own (see *Raquiza v. Raquiza* (supra)).

For the reasons adumbrated above, I allow the appeal and vary the maintenance order of the trial Court. I make an order that the husband do pay to his wife and son a sum of RM500 a month for their maintenance and that this order do take effect from the 14 April, 1992. In view of the peculiar circumstances of this case, I do not propose to order costs. However, I make an ancillary order that security for costs, if deposited, be refunded to the husband.

Order accordingly.